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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-329

JOHN J. MARRA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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John J. Marra, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on July 24, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reprinted in Appendix A and while not yet officially reported, it is unofficially reported in 73-2 U.S. Tax Cas. ¶9578.

The oral opinion of the United States District Court for the Eastern District of Michigan, Southern Division, given in open court on July 5, 1972 is not officially or unofficially reported but is printed at pages 96a through 100a of the separate appendix filed, and certified and transmitted by the Clerk of the United States Court of Appeals for the Sixth Circuit as a part of the record. This oral opinion is reprinted and set forth in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Eastern District of Michigan, Southern Division was entered on July 24, 1973. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Do overtures toward settlement of an income tax audit on a civil basis by an Internal Revenue Agent through the discussion of adjustments and the submission to the taxpayer of a list of "proposed changes", constitute affirmative misrepresentation as to the nature of the audit, re-

quiring suppression of incriminating evidence obtained from the taxpayer thereafter, but before referral of the case to the Intelligence Division of the Service?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the unreasonable search and seizure provision of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, John J. Marra, was indicted in June, 1971 in the Eastern District of Michigan, Southern Division on two counts of willfully making and subscribing a return which he did not believe to be true and correct as to every material matter in violation of Section 7206(1) of the Internal Revenue Code of 1954. Jurisdiction of the District Court was based on Title 18 U.S.C. §3231.

Petitioner filed a motion to suppress evidence and return seized property in January, 1972 and a hearing on said motion was had on July 5, 1972. The facts before the trial court consisted of, in pertinent part, notes of the Internal Revenue Agent in the form of various lists of information requested and a list entitled "Proposed Changes", notes of the defendant's accountant of conferences and meetings which he had with the Agent, and an affidavit of the defendant. This affidavit was attached to the Motion to Suppress and stated that the defendant, through the actions of the Agent was led to believe that the examination was in the process of being settled on a

civil basis and as a consequence thereof was induced to give statements and relinquish documents which were incriminating in nature (R 7a, 8a).

Both lower courts have held that such facts did not amount to affirmative acts of misrepresentation as to the nature of the inquiry.

The District Court viewed the furnishing of a list of proposed adjustments not as an act of deception but as a further warning that the tax return was defective (R 99a).

In affirming the lower court's decision, the Court of Appeals stated that the fraud, deceit and trickery charged reside only in the conclusional assertions of Dr. Marra and his attorney, placing apparent emphasis on the fact that the Revenue Agent's dealings were with the doctor's accountant and the charged fraud and deceit had to come second hand from the accountant.

In addition, the Court of Appeals cited as the controling law, *United States v. Prudden,* 424 F. 2d 1021 (5th Cir. 1970), cert. denied, 400 U.S. 831, which held that the mere failure of a revenue agent to warn the taxpayer that the investigation may result in criminal charges does not constitute fraud, deceit or trickery.

REASONS FOR GRANTING THE WRIT

This petition raises a substantial and important question concerning the rights of virtually all taxpayers who are audited by the Internal Revenue Service. The importance of the issue raised herein can be demonstrated by a review of the statistics which reflect the potential impact upon the citizens of the United States that a review of this question may have. The *1972 Commissioner's Annual Report* states

at page 10, "In 1972, the Service examined 1,695,849 returns, 49,920 more than the previous year. . . . Recommendations for additional assessments reached $3.413 billion."

Each and every one of the millions of taxpayers who will be audited by the Internal Revenue Service in the future will go through the standard procedure of the Internal Revenue Service for making adjustments which affect the tax liability of these taxpayers. Thus far, both lower courts have failed to appreciate, or at least have exhibited a misunderstanding of the real issue involved in this case. Both the District Court and the Court of Appeals have in their opinions, cited the myriad of cases which hold that the Internal Revenue Service, through its agents, is under no duty to keep a taxpayer advised as to the changing nature of an investigation. Neither court has come to grips squarely with the issue of whether or not a taxpayer should have, and in fact does have, the right to rely upon the representations of an Internal Revenue Agent that once the examination of his tax returns has reached the stage where the Revenue Agent is discussing adjustments and proposing changes to the income tax liability of the taxpayer, this is tantamount to an assurance that no criminal proceedings will thereafter ensue. This case involved a typical Internal Revenue Service examination. The taxpayer was contacted by a Revenue Agent and informed that his returns were to be audited. The Revenue Agent was referred to the taxpayer's accountant. Throughout the course of the audit the Revenue Agent found certain items which were in error and submitted a list of proposed changes to the taxpayer's accountant who thereupon discussed these changes with his client. This set of facts is substantially identical to those which occur countless times in the course of the many examinations conducted by the Internal Revenue Service. It is at this point that a tax-

payer becomes apprised of the fact that the Revenue Agent is proposing changes to his civil liability and that any information obtained by the Agent beyond this point which turns out to be incriminating cannot be said to have been obtained voluntarily but must have been obtained as a direct result of the affirmative deception and misrepresentation of the Revenue Agent. The practical result and effect of such a set of circumstances is that the conduct of the Revenue Agent in this case is of the type prohibited by this court in *Gouled v. United States,* 255 US 298 at 306 (1929) as follows:

> "• • • In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he be compelled to be a witness against himself in a criminal case."

Such conduct of an Agent of the Internal Revenue Service was also considered in the case of *Cohen v. United States,* 405 F. 2d 34 at 36 (8th Cir. 1968) cert. denied, 394 US 943, where the court stated:

> "• • • We follow the latter cases but reiterate our warning in *White v. United States,* 395 F. 2d 180 (8th Cir. 1968), that Agents must not affirmatively mislead a taxpayer into believing that the investigation is exclusively civil in character and will not lead to criminal charges."

Furthermore, both the District Court and the Court of Appeals appear to be under the misapprehension that in order to make a determination that the taxpayer was misled or lulled into a false sense of security by the pro-

posal of civil adjustments, there must be some intentional wrong doing or at least sinister and evil motive on the part of the Revenue Agent. Such an element cannot and should not be found necessary by this Court. To reach any other conclusion overlooks the very reason for extending the coverage of the Fifth Amendment to circumstances such as this—that is, the subjective effect which the actions of the Revenue Agent have *in the mind of the taxpayer,* who has absolutely no way of knowing whether or not the misleading conduct is in fact innocent or intentional in the mind of the Agent. Apparently the Court of Appeals failed to consider that the effect on a taxpayer who is misled and thereby furnishes incriminating evidence to the Revenue Agent is still the same regardless whether the misleading was by design or unintentional. This very point was discussed in *United States v. Guerrina,* 112 F Supp. 126, at 129 (E.D. Pa. 1953), modified in part at 126 F. Supp. 609 (E.D. Pa. 1953):

> "Whether the arrangement to have Agent Coram make the appointment with the defendant was by *design* to obtain entrance for Special Agent Pearson, *or whether it was done innocently, the effect insofar as the defendant was concerned was the same.* He was deluded into giving consent to the examination of his papers and records and his action in so doing cannot be said to be voluntary insofar as making available his papers for the purpose of investigation to establish fraud for criminal prosecuting purposes." (Emphasis added.)

The petitioner is not asking that this Court place an undue burden upon the investigative functions of the Internal Revenue Service by holding that once a Revenue Agent discusses adjustments, a criminal case can never be forthcoming. A rule of law such as is requested of this Court would only require Internal Revenue Agents to

make a diligent effort to satisfy themselves in their examinations that no suspicion of fraud is present before they take the step of discussing adjustments in any form with the taxpayer or his representative. At most, such a rule would only prevent over-zealous agents from misleading taxpayers, whether intentionally or unintentionally, as to the nature of the investigation by a premature discussion of civil adjustments. In fact, it would do nothing more than require Internal Revenue Agents to comply with instructions in their own manual, in instances where there is a suspicion of fraud, cautioning agents not to say anything that could be construed as an offer of immunity or as a step toward settlement of the case on a civil basis *Audit Technique Handbook for Internal Revenue Agents* IRM 4231, 1969 Par. (10) 86 (1) (g).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

OPINION OF THE COURT OF APPEALS

No. 72-2154

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America,
Appellee,
v.
John J. Marra,
Appellant.

Appeal from the U. S. District Court for the Eastern District of Michigan.

Decided and Filed July 24, 1973

Before Phillips, Chief Judge, Lively, Circuit Judge and O'Sullivan, Senior Circuit Judge.

O'Sullivan, Senior Circuit Judge. John J. Marra, M.D., was charged in a two-count indictment with violation of Title 26 U.S.C. § 7206(1)—making false income tax returns. Count I had to do with his return for the year 1965; Count II related to his return for the year 1966. He was convicted on Count I, and upon a jury's inability to agree a mistrial was ordered as to Count II.[1] Dr. Marra does

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[1] At the time of sentencing on Count I, the government attorney said, "The Government will dismiss your Count II if the conviction on Count I does stand up." Defense counsel said, "That is acceptable to us."

not challenge the sufficiency of the evidence upon which he was convicted. He asks reversal of his conviction upon his claim that Honorable Fred W. Kaess, Chief Judge of the United States District Court for the Eastern District of Michigan, erred in denying two pretrial motions—one to dismiss the indictment, and the other to suppress, on Fifth Amendment grounds, whatever evidence he had furnished to agents of the Internal Revenue Service. These motions were renewed at the close of proofs in support of appellant's then motion for a directed acquittal. They were again denied and the case was submitted to the jury.

We affirm the denial of the pretrial motions.

I. *Motion to Dismiss*

Count I of the Indictment charged:

> "That on or about April 15, 1966, in the Eastern District of Michigan, JOHN J. MARRA, a resident of Lake Orion, Michigan, wilfully and knowingly made and subscribed a 1965 Federal Income Tax Return (IRS Form 1040), which was verified by a written declaration that it was made under the penalties of perjury, and which was filed with the District Director of Internal Revenue at Detroit, Michigan, and which tax return he did not believe to be true and correct as to every material matter: in that he reported Schedule C gross receipts of $54,742.59, interest income of $2,536.45, and Schedule C other business expenses of $16,773.07, whereas, as he then and there well knew and believed, the correct amounts he should have reported were $78,330.58, $3,168.79, and $15,955.07 respectively; in violation of Section 7206(1), Title 26, United States Code."

Count II charged:

> "That on or about June 1, 1967, in the Eastern District of Michigan JOHN J. MARRA, a resident of Lake Orion, Michigan, wilfully and knowingly made and subscribed a 1966 Federal Income Tax Return (IRS Form 1040) which was verified by a written declaration that it was made under the penalties of perjury and which was filed with the District Director of Internal Revenue at Detroit, Michigan, and which tax return he did not believe to be true and correct as to every material matter: in that he reported a $12,000.00 charitable contribution based upon a real estate appraiser's report secured by false information (furnished by the defendant) when in fact he well knew and believed that the correct amount of the charitable deduction was substantially less; and in that he reported interest income of $1,396.48, well knowing and believing the correct amount of interest income was $3,282.47; in violation of Section 7206(1), Title 26, United States Code."

Appellant's motion to dismiss contained these averments:

> "1. The indictment fails to state the particular act or acts charged with reasonable definiteness so as to enable the defendant to prepare his defense, and that it is so vague, indefinite and uncertain that it does not inform the defendant of the nature or cause of the accusation made against him, and in the foregoing respects does not comply with the Fifth and Sixth Amendments to the Constitution of the United States.
>
> "2. The indictment does not contain a plain, concise and definite written statement of the essential

facts constituting the offense charged, and, therefore, does not comply with Rule 7(c) of the Federal Rules of Criminal Procedure.

"3. In Count One, the indictment purports to allege that defendant wilfully and knowingly made and subscribed a 1965 Federal income tax return which he did not believe to be true and correct as to every material matter. This merely states a conclusion rather than the essential allegations of fact which constitute the alleged offense, in that:

a. No facts are stated which allege that defendant signed a completed tax return (when in fact the Agents knew or should have known the defendant signed a blank tax return).

b. The defendant has, by affidavit attached set forth the facts proving the signing of two blank tax return forms, and extra copy of which was part of the files shown to the Agents by the defendant's accountant, Angus Campbell (copy of said blank return attached).

"4. In Count Two, the indictment alleges in vague and uncertain terms that the defendant furnished false information to an appraiser. This is a mere conclusion. No facts are alleged which would constitute the elements of an alleged offense or apprise the defendant sufficiently to enable him to prepare a defense.

"Likewise in Count Two the indictment alleges that the defendant did not report all of this interest-income.

"In his attached affidavit, the defendant denies that he gave any such alleged false information to the appraisers and in substantiation thereof attaches a copy of said appraisal which states as follows:

a. That the appraisers made a careful inspection of the subject property, noted and analyzed all of the determining factors, both favorable and unfavorable, that indicate value, and then arrived at the opinion that the fair market value of the property as of January 6, 1966 was $12,000.00.

b. That the appraisers were furnished a survey of the property and the dimensions and legal description used in the appraisal were taken off this survey made on October 25, 1965 by Kieft Engineering of Clarkston, Michigan."

The factual material of Dr. Marra's affidavit supporting the motion said:

"In April 1966, while discussing my income tax matters with my accountant, Angus Campbell, he requested that I sign two blank forms 1040, Federal income tax forms, since there was not sufficient time for him to finish the return and send it to me for signature. Mrs. Marra and I signed two such blank forms and returned them to Mr. Campbell.

"After delivering the signed blank income tax forms to Mr. Campbell, I did not meet, or discuss the contents of my 1965 Federal income tax return, with Angus Campbell.

"To the best of my knowledge and belief the finished product, that is the completed 1965 Federal income tax return was mailed from the office of Mr. Campbell."

The District Judge held that the indictment was legally sufficient. His order recites:

"An indictment does not have to be put in the most definite and certain terms possible. An indictment is sufficient if it (1) alleges all of the elements of the offense; (2) fairly informs the defendant of what he must be prepared to meet; (3) protects him against double jeopardy; and (4) enables the Court to determine whether the facts alleged are sufficient in law to withstand a motion to dismiss or to support a conviction. *Hagner* v. *U.S.*, 285 U.S 427 (1932); *U.S.* v. *Levinson,* 405 F.2d 971 (6th Cir. 1968)."

• • • • •

"Thus the Court finds that the indictment is neither vague nor indefinite. An offense is charged, and defendant is well aware of the nature of the offense and the underlying transactions which form the basis for the charge. Therefore, the indictment fully complies with all of the requirements of the Fifth and Sixth Amendments to the Constitution of the United States and Rule 7(c) of the Federal Rules of Criminal Procedure."

A reading of the indictment makes clear the correctness of the foregoing.

In dealing with the factual and defensive allegations of appellant's affidavit supporting his motion, the District Judge said:

"Paragraphs 3a, 3b, 4a, and 4b of defendant's motion raise factual issues. A trial is the appropriate place to resolve these issues. A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence. The sole function of this type of motion is to test the sufficiency of the indictment to charge an offense. *U.S.* v. *Sampson,* 371 U.S. 75

(1962); *U.S.* v. *Luros,* 243 F. Supp. 160 (N.D. Iowa, W.D. 1965); *U.S.* v. *Winer,* 323 F. Supp. 604 (E.D. Pa. 1971). The Court should not consider evidence not appearing on the face of the indictment. *Winer, supra.*"

The District Judge's recited reasons for his ruling are so clearly correct that we need not support them with our own dissertation.

At trial, Dr. Marra's accountant testified that on the evening of April 14th he had already prepared a pencil draft of the proposed return and went over it with Dr. Marra who either approved it or did not question its accuracy. The accountant or his secretary typed in all of the material from the pencil draft onto the 1040 return already signed by the doctor and his wife. This was sent in to the Internal Revenue Department as appellant's tax return for 1965.

Appellant does not question the sufficiency of this evidence to warrant his conviction under Count I, and we mention it only as supporting the propriety of the District Judge's refusal to consider Dr Marra's *ex parte* affidavit in denying the motion to dismiss.

II. *Motion to suppress.*

Appellant's brief to us, as a statement of issue presented, says:

> "1. Whether the lower court erred in denying the Defendant's motion to suppress evidence when the facts upon which the decision was based clearly established that the Defendant had been misled by the Revenue Agent into believing that a civil audit only was being conducted."

The basic charges of his Motion to Suppress were:

"1. During the period from on or about February 19, 1968 through April, 1969, statements and admissions were extracted from defendant and certain books, records and papers, of which he is the owner and are more specifically hereinafter set forth, were unlawfully obtained from him by Agents of the Internal Revenue Service.

"2. The statements obtained concerned matters relating to defendant's sources of income and deductions during the indictment period and the books, records and papers obtained from him or his accountants consisted of:

a. bank and brokerage records, copies of canceled checks, paid invoices or receipts, and the like relating to the periods 1965 and 1966.

b. other miscellaneous records, which records were the personal records of the defendant.

"3. The foregoing statements and property were obtained without a search warrant, and in derogation of defendant's rights under the Fourth and Fifth Amendments of the United States Constitution, in that, such statements and property *were obtained by deceit and misrepresentation, both active and passive,* to the effect that the nature of the investigation was that of a routine civil audit. (Emphasis supplied.)

"4. Defendant proffers himself for the taking of testimony in support of this motion, and solely for that purpose, such testimony not to be a waiver of his right not to incriminate himself or of any other right or privilege."

An affidavit by Dr. Marra, supporting his Motion to Suppress recited:

"2. In the latter part of 1967 and the first two months of 1968, Revenue Agent Bruce Norvell was conducting an audit of my 1965 and 1966 tax returns and, for the most part, obtained relevant information from my accountant, Edward Derbabian, C.P.A.

"3. I was informed by my accountant at several points in time during this period that the Agent was requesting certain information, and I supplied whatever I had available to my accountant which I believed he would submit to the Revenue Agent.

"4. In the latter part of February, 1968, I was made aware through my accountant that the Revenue Agent had submitted a list of proposed adjustments, these being items which I understood he was disagreeing with and planning to change.

"5. As a result of this turn of events, I believed that the Agent was in the process of closing the case and that there was no cause for concern that a criminal investigation was taking place or would take place.

"6. When I received the two letters from the Internal Revenue Agent in July of 1968, I was completely convinced that no criminal investigation would ensue, because the wording in these letters gave me the impression that the Agent was finally closing the case.

"7. As a result of the foregoing, *I was wrongfully deceived, falsely misled by misrepresentation, both active and passive, and surreptitiously induced* to give statements and provide documents and records in contravention of my rights under the Fourth, Fifth and

Sixth Amendments of the Constitution." (Emphasis supplied.)

In addition to the Motion to Suppress and Dr. Marra's supporting affidavit, his counsel filed a pleading denominated Memorandum in Support of Motion to Suppress and Return Seized Property. With this, he filed various exhibits, A to H. Except for two letters, discussed below, these exhibits contained the revenue agent's requests for information needed for the audit then being conducted; also some memoranda made by appellant's accountant. When advised that an audit was being made of his 1965 and 1966 tax returns, Dr. Marra referred the agent to his accountant. These inquiries carried titles such as "Items Requested Re Audit of Federal Income Tax Returns of John J. and Dorothy M. Marra," "Dr. Marra Pending," "Proposed Changes," and "Items Requested re Audit of Federal Income Tax Returns of Clinical Laboratories, Incorporated." Dr. Marra was the sole shareholder of the mentioned corporation. As did the District Judge, we find nothing in these exhibits that would excite a belief upon the part of Dr. Marra or his accountant that criminal prosecution might not ultimately be the product of the civil division's audit; neither do we find any indicia of fraud and deceit. Exhibits G and H were letters to Marra dated respectively July 10 and July 18, 1968, from Norvell, the Internal Revenue Agent conducting the audit. The letter of July 10 asked for certain information, and concluded:

> "I am meeting with Mr. Derbabian [Marra's accountant] July 17, 1968. Completion of the audit will be expedited if you could provide him with the above information by that date."

The letter of July 18 told Marra that the agent and Derbabian had scheduled an appointment for July 24 to dis-

cuss the returns of Clinical Laboratories, Inc. It advised that Marra's accountant had compiled a list of items necessary to evaluation of tax liabilities reflected on the 1965, 1966 returns of the mentioned corporation. The letter concluded:

> "If you can assist Mr. Derbabian [Marra's accountant] in obtaining, for our appointment July 24, 1968, the items he has listed then the audit may be completed in the very near future."

We again emphasize that there is nothing to indicate, nor was there any evidence introduced at trial, that the then examining agent was entertaining a plan to refer the matter to the Intelligence Division to consider possible criminal conduct by Dr. Marra. The letter was not calculated to justify a belief that such investigation might not be later initiated; neither is there reason for a belief that the agent's expressed hope that the furnishing of the requested items might lead to completion of the audit "in the near future" was not entertained in good faith. We find nothing in the foregoing to sustain appellant's claim that thereby Dr. Marra,

> "* * * was wrongfully deceived, falsely misled by misrepresentation, both active and passive, and surreptitously induced to give statements and provide documents and records in contravention of [Marra's] rights under the Fourth, Fifth and Sixth Amendments of the Constitution."

Another document filed in support of the motion to suppress was an affidavit of an attorney, Charles A. Dean, who identified himself as having been counsel for Dr. Marra during part of the investigation of the questioned tax returns. This affidavit recited:

"3. That on or about March 31, 1969, I wrote to Special Agent Lance Conrad, enclosing a copy of a Power of Attorney, and inquired as to the status of the subject matter.

"4. That on or about April 1, 1969, Special Agent Conrad called me and, in response to my inquiry, stated that the entire matter did not appear serious and that he was merely attempting to resolve a few items still being questioned on the defendant's 1965 and 1966 tax returns.

"5. That on or about April 3, 1969, Special Agent Conrad called me. He stated that he would like to talk to the defendant. I again asked him what the purpose was, and whether there was any reason for me to be present. Mr. Conrad replied in words to the effect that he wanted to ask the defendant a few routine questions so that he could finally conclude the matter. At no time did Special Agent Conrad indicate, by word or otherwise, that the defendant was under investigation for criminal fraud. That, in reliance upon his clear intimation that no criminal action was contemplated, I consented to his interviewing the defendant out of my presence."

The dates set out were *after* this matter had been referred to the Intelligence Division of the Revenue Department. The attorney knew this and was aware that inquiries by a Special Agent of the Intelligence Division had to do with an investigation for possible criminal conduct by his client. Neither in the Motion to Suppress nor in attorney Dean's affidavit was there a showing that the conference between Dr. Marra and Special Agent Conrad did in fact take place. There was nothing to show that, if it did, the government obtained any information used to support the

charges made against Dr. Marra. Of controlling importance is the clear concession by Dr. Marra's counsel, made at the hearing on the Motion to Suppress, that upon the Special Agent's initial interview with him, Dr. Marra was given all of the so-called *Miranda* warnings. There was no showing to negative that these warnings were not repeated at each interview thereafter.

We are not persuaded that the affidavit of attorney Dean, the affidavit of Dr. Marra and the Exhibits attached to the motion to suppress required the District Judge to hold a pretrial evidentiary hearing before ruling on the motion. In denying the motion, the District Judge said:

> "Therefore, in view of all these considerations, the Court finds there were no acts of fraud or deception of affirmative matters practiced by either of the agents on the defendant and that the incriminatory evidence was divulged [by] the defendant voluntarily, well knowing all the consequences of his acts, therefore, the motion to suppress is denied."

While appellant's claim of error here deals only with the denial of his *pretrial* motion, such motion was renewed and denied at the close of proofs. At trial, Agent Conrad, referred to in the affidavit of attorney Dean, testified that upon his first meeting with Marra, he gave him the full *Miranda* warnings and repeated them at any subsequent meeting. Dr. Marra did not testify at trial; neither did his affidavit supporting his pretrial motion negate such fact. Testimony at trial or the lack of it cannot be controlling of the issue before us; we mention it only to emphasize the shortcomings of the pretrial motion.

We are satisfied, as was the District Judge, that the agent Norvell's requests for information from Marra's accountant and his expressed hope that the audit might be

expeditiously concluded, cannot be read as masking a vicious plan to invade Dr. Marra's constitutional rights. The fraud, deceit and trickery charged reside only in the conclusional assertions of Dr. Marra and his attorney. It should be mentioned that Norvell, who was conducting the audit for the civil division, had no direct conversations with Dr. Marra. As requested by Dr. Marra, Norvell's dealings were with the doctor's accountant and the charged fraud and deceit had to come, if at all, second hand from the accountant's reports of his dealing with Norvell.

Without extended discussion, we set out the controlling law as to what must be shown to warrant a finding that a taxpayer has been tricked or deceived by government agents into providing incriminating evidence to such agents. In *United States* v. *Prudden,* 424 F.2d 1021 (5th Cir. 1970), the rule is given:

> "[T]he mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to establish the existence of fraud, *and this showing must be clear and convincing.*" 424 F.2d at 1033. (Emphasis supplied.)

Such rule was stated again in *United States* v. *Tonahill,* 430 F.2d 1042, 1044, (5th Cir. 1970). In our decision in *United States* v. *Stribling,* 437 F.2d 765, 772 (1971), we expressed our agreement with the rule as quoted, as set out in *Prudden,* and quoted with approval the following from *United States* v. *Squeri,* 398 F.2d 785, 788 (2d Cir. 1968):

> "• • • [T]he information that a taxpayer's returns are under audit gives sufficient notice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action when they they speak to him."

The language of Judge Lumbard, speaking for the Second Circuit in *United States* v. *Sclafani*, 265 F.2d 408 (2d Cir. 1959), fits nicely the situation here.

> "A 'routine' tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.
>
> • • • • •
>
> "Moreover, it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose." 265 F.2d at 414, 415.

We are satisfied that the presentations by affidavit and exhibits to support the pretrial motion to suppress lacked the necessary "solidity" to require a District Judge to conduct an evidentiary hearing. See *United States* v. *Giglio*, 16 F.R.D. 268, 270 (S.D. N.Y. 1954), *affirmed, United States* v. *Giglio*, 232 F.2d 589 (2d Cir. 1956), *affirmed sub nom, Lawn* v. *United States*, 355 U.S. 339, 347 (1958). Neither did the subjective conclusions of Dr. Marra add up to the "clear and convincing showing" required by *Prudden, supra.*

Although not suggested at the hearing on the Motion to Suppress, appellant urges upon us that the manner in which agent Norvell conducted the audit violated a provision of the Audit Technique Handbook for Internal Revenue Agents, which, in part, advises that such agents:

> "[S]hould not say anything that could be construed as an offer of immunity or as a step toward a settlement of the case upon a civil basis."

Aside from our doubt that such advice to revenue agents constitutes a definition of the rights of a taxpayer—see *United States* v. *Lockyer*, 448 F.2d 417, 421 (10th Cir. 1971)—we do not consider that it overrules the law requiring a "solid" and "clear and convincing" showing that the taxpayer was the victim of fraud and deceit employed by involved government agents.

Judgment affirmed.

APPENDIX B

OPINION OF THE DISTRICT COURT

Criminal Action No. 45935

In the
DISTRICT COURT OF THE UNITED STATES
for the Eastern District of Michigan
Southern Division
United States of America,
Plaintiff,
v.
John J. Marra,
Defendant.

Opinion of Honorable Fred W. Kaess, July 5, 1972

* * * Now, let's get to the motion to suppress, which I think is the most important here.

I have gone through the briefs and the exhibits attached thereto and with respect to the motion to suppress pursuant to Rule 41(e), and according to defendant's affidavit, as I understand it, a revenue agent conducted an audit of the defendant's '65 and '66 tax return, and during the course of the audit, according to the affidavit he dealt with the defendant's accountant, but from time to time through the accountant the defendant did supply certain information which the agent did request. Even the letter that is an exhibit in this matter, the agent submitted a list—not a letter but a list of—he did submit a list of proposed adjustments, and the list itself did set forth a number of items which the agent either questioned or was proposing to disallow.

Again there were subsequent meetings and a great many meetings, I presume, with the defendant's accountant. And then later in this same longhand situation he requested, I think it was July 10th, the agent requested some further information, and the last paragraph is that which you have cited of the letter, the agent stated:

> "I am meeting with Mr. Derbabian on July 17th, 1968. The completion of the audit will be expedited if you could provide him with the above information by that date."

Then in a later letter, some eight days later, on July 18th, the agent further stated:

> "Mr. Derbabian and I have scheduled a final meeting in July. If you could assist Mr. Derbabian in obtaining for our appointment, July 24, 1968, the items listed, then the audit can be completed in the very near future."

So apparently it was after the audit was completed by the agent that has been mentioned here, Norvill, a special agent then contacted the defendant and at this first meeting the defendant was advised of his constitutional rights and given appropriate warnings about the nature of the investigation and the function of a special agent.

Even following that, after the initial contact, the special agent had a number of telephone conversations with the defendant's attorney, and it was during the last telephone conversation that defendant alleges that the special agent told the attorney, according to the affidavit, that there were only a few odds and ends to clearup and said there was no need for the attorney to be present at the final interview.

Among other things, as claimed by the defendant, those being the two that stood out in my mind or those items that I have just indicated are those that stood out in my mind. The defendants now claims that the above conduct by the Revenue Agent and the Special Agent, for that matter, amounted to acts of fraud and misrepresentatation, which requires suppression of certain evidence in this case.

There is no doubt in my mind that the law as stated by the defendant's counsel, Mr. Raymond, is the law and that is that evidence obtained by a revenue agent or a special agent by deception or misrepresentation cannot be used in a criminal proceeding against the person upon whom the fraud was practiced, and you have cited cases.

And continuing along those lines, in other words, a revenue agent must not affirmatively mislead a taxpayer into believing that the investigation is exclusively civil in character and will not lead to criminal charges and that is the case of White against the United States citation in the Eighth Circuit.

As has been mentioned by counsel, all of the Circuits except the Seventh have held that Miranda is inapplicable to tax investigations conducted by a special agent or by an agent employed in the Auditing Division where the taxpayer is not in custody, and I think that has been further stated on a slip sheet that just came down not too long ago, a brand new case. I don't have the cite at hand.

Do you happen to have the case?

The one I am—there is a new slip sheet from the Supreme Court on a case that I thought might have some bearing on this case.

Mr. Ruane: I don't know of it offhand.

The Court: You don't get them?

Mr. Ruane: No, Judge.

The Court: All right. By a slip sheet, I mean the advance paper copy that we get.

It has been held in the Bates case, which we are very familiar in this case, a Sixth Circuit case, that documents and other evidence which are voluntarily given to a revenue agent in a civil tax investigation without promise of immunity and in the absence of fraud or misrepresentation is admissible even though the taxpayer did not anticipate the criminal prosecution.

And going a little further, the Fourth Amendment thus only requires that when a taxpayer is requested to turn over documents, to be apprised of the Government's concern with the accuracy of his reports, and thus of such hazards as may be incident to a voluntary disclosure. That is the Sclafani case that you referred to.

And the Second Circuit has said that in the *United States v Squeri*, the very fact that an audit is being conducted is sufficient to give a necessary warning of the possibility of a criminal prosecution regardless of whether the agent contemplates civil or criminal action when they speak to him.

It is the Court's opinion that in this case, that the affidavit fails to specify any affirmative acts of misrepresentation or deceptions by the agent. Counsel has referred to some subtle phrasing, perhaps, at best, and the affidavit alludes to hearsay information that the defendant received from his accountant and to the defendant's opinion as to the meeting of certain letters written by the agent. The Court does not construe those letter as any affirmative proof of not intending any criminal action.

The affidavit further reveals that in February of '68 he knew that his return was being questioned by the agent.

They should have put him on notice that a criminal prosecution could result.

Of course, the Court is aware of the previous charge that is involved in this case. The Court views the furnishing of the list of proposed adjustments by the revenue agent not as an act of deception but as a further warning to the defendant that his tax return was defective, and the fact that the agent, the revenue agent stated on two or three occasions that the audit will be completed in the future if nothing more than an expectation concerning the audit, and certainly there were no affirmative promises of immunity.

Perhaps I should go further, and although I am in great sympathy with the defendant's argument, there is nothing in this record to indicate that these statements were made for the purpose of tricking the defendant into divulging incriminating evidence. By that I probably have in mind that the defendant was not a novice in these matters.

Therefore, in view of all these considerations, the Court finds there were no acts of fraud or deception of affirmative matters practiced by either of the agents on the defendant and that the incriminatory evidence was divulged the defendant voluntarily, well knowing all the consequences, of his acts, therefore, the motion to suppress is denied.

* * * * *

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Specific Provisions of the Constitutional Amendments Relied Upon:

Fourth Amendment:

". . . the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures . . ."

Fifth Amendment:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

SUPREME COURT, U. S.

OCT 9 1973

MICHAEL RODAK, JR., CLERK

No. 73-329

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN J. MARRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 9-24) is not yet reported. The opinion of the district court (Pet. App. B 25-29) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1973. The petition for a writ of certiorari was filed on August 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a revenue agent's discussion with a taxpayer's representative of proposed civil adjustments prior to his suspicion of any criminal conduct constitutes a representation by the agent that no criminal investigation will ensue so that self-incriminating evidence disclosed by the taxpayer cannot be used against him in a later criminal proceeding.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portions of the Fourth and Fifth Amendments are set forth at Pet. App. C 30.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of willfully making and subscribing a false tax return in violation of 26 U.S.C. 7206(1). The court of appeals affirmed (Pet. App. A).

Petitioner does not challenge the sufficiency of the evidence. His argument is solely directed at the denial of his motion in the district court to suppress certain incriminating evidence made available by him to the revenue agent prior to the time the criminal investigation commenced. Petitioner asserts that the conduct of the revenue agent implied that the civil audit was to be closed and that no criminal investigation would be made. He claims that he was misled into disclosing evidence incriminating himself in reliance on the revenue agent's conduct.

The evidence showed that the revenue agent initially informed petitioner in early 1968 that his 1965 and 1966 individual income tax returns were to be audited. Petitioner referred the agent to his accountant, Edward Derbabian, C.P.A. (R. 7a).[1] In February 1968, the agent submitted several lists of requested information to Mr. Derbabian (R. 17a-27a, 181a-190a), including a handwritten list entitled "Proposed Changes" (R. 17a-21a, 181a-184a). This list outlined various problem areas and requested substantiation with respect to several issues. The agent also wrote two letters to petitioner (R. 28a-29a) requesting additional information. The first letter of July 10, 1968 stated (R. 28a):

> I am meeting with Mr. Derbabian July 17, 1968. Completion of the audit will be expedited if you

[1] "R." references are to the record appendix in the court of appeals.

> could provide him with the above information by that date.

On the day following the July 17 meeting, the agent again wrote to petitioner and concluded (R. 29a):

> If you can assist Mr. Derbabian in obtaining, for our appointment July 24, 1968, the items he has listed then the audit may be completed in the very near future.

Only after the July 24 meeting, at which petitioner's accountant failed to explain satisfactorily the questioned areas, did the revenue agent suspect that there was a possibility of underpayment of taxes due to fraud. The agent thereupon referred the case to the Intelligence Division of the Internal Revenue Service for possible criminal investigation (R. 174a).

ARGUMENT

1. Both courts below correctly rejected petitioner's attempt to suppress evidence voluntarily given by him during a civil audit at which time the revenue agent had no basis for suspecting that there was fraud. It is the settled rule that there must be clear and convincing evidence of fraud, trickery or deceit by the revenue agent upon the taxpayer which materially misrepresents the nature of the inquiry in order to justify suppression. *United States* v. *Stribling,* 437 F. 2d 765, 771-773 (C.A. 6), certiorari denied, 402 U.S. 973; *United States* v. *Tonahill,* 430 F. 2d 1042, 1044 (C.A. 5) certiorari denied, 400 U.S. 943; *United States* v. *Prudden,* 424 F. 2d 1021, 1033 (C.A. 5), certiorari denied, 400 U.S. 831; *Cohen* v. *United States,* 405 F. 2d 34, 36 (C.A. 8), certiorari denied, 394 U.S. 943; *United States* v. *Parenti,* 326 F. Supp. 717, 723 (E.D. Pa.), affirmed *per curiam,* 470 F. 2d 1175 (C.A. 3), certi-

orari denied May 7, 1973 (No. 72-1156); *Biggs* v. *United States,* 246 F. 2d 40, 44 (C.A. 6), certiorari denied, 355 U.S. 922.[2]

Contrary to petitioner's contention (Pet. 5), the revenue agent's mere discussion of proposed civil adjustments with petitioner's representative during the audit did not constitute a representation that no criminal proceedings would thereafter be brought. Although the list submitted by the agent to petitioner's representative was entitled "Proposed Changes," it was in fact a request for further substantiation and could not in any way be interpreted as an offer to settle the case on a civil basis. Moreover, petitioner cannot claim to have been misled by the initial civil audit. As the Second Circuit stated in *United States* v. *Sclafani,* 265 F. 2d 408, 414-415, certiorari denied, 360 U.S. 918:

> A "routine" tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.

---

[2] Petitioner's reliance (Pet. 6) upon *Gouled* v. *United States,* 255 U.S. 298, is misplaced. There, after a criminal investigation had commenced, government officials, pretending to make a friendly call upon the defendant, gained admission to his office and in his absence, without any warrant, seized and carried away several documents. Similarly, *United States* v. *Guerrina,* 112 F. Supp. 126 (E. D. Pa.), cited by petitioner (Pet. 7), involved agents' examinations of the taxpayer's records in his absence and without his authorization.

It was only after petitioner's representative failed to satisfy the agent that the latter began to suspect possible fraud. "The investigation thus concluded with exactly what is a foreseeable result of any income tax return audit, should the audit develop evidence of fraud." *United States* v. *Wheeler*, 256 F. 2d 745, 746 (C.A. 3). See also *United States* v. *Squeri*, 398 F. 2d 785, 788 (C.A. 2); *Spahr* v. *United States*, 409 F. 2d 1303, 1306 (C.A. 9), certiorari denied, 396 U.S. 840.

2. Apart from the fact of the civil audit itself, petitioner has not identified any act of the revenue agent which might constitute fraud, deceit, or trickery. The agent had no suspicion of any criminal wrongdoing either at the time he submitted his request for information in February 1968 or in July when he wrote to petitioner. Moreover, nothing done or alleged to have been done by the agent indicates that any subsequently discovered criminal conduct would be ignored by the Internal Revenue Service. As the district court found (Pet App. B 28): "* * * the affidavit [in support of petitioner's motion to suppress] fails to specify any affirmative acts of misrepresentation or deceptions by the agent."

Despite this failure, petitioner argues (Pet. 7) that the operative legal test should be "the subjective effect which the actions of the Revenue Agent have *in the mind of the taxpayer** * *" (emphasis in original). But the state of mind of either petitioner or his representative during the audit cannot be demonstrated by objective means. It therefore "can hardly be the basis for an allegation of fraud and deceit." *United States* v. *Parenti, supra*, 326 F. Supp. at 723. Without specific evidence, petitioner's "broadside charge of fraud, deceit, trickery and misrepresentation" *(ibid)* is to no avail.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1973.

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